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Questions and Answers-Copyright Column

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LEGAL ISSUES



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Cases of Note — Copyright — The Dreadful Jumble of Acts

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SOCIETE CIVILE SUCCESSION RICHARD GUINO V. JEAN-EMMANUEL RENOIR AND (a whole slew of) OTHERS. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. 549 F.3d 1182; 2008 U.S. App. LEXIS 24755.

Pierre-Auguste Renoir did not work alone. He had help named **Richard Guino**. Or rather **Guino** did the work and **Renoir** put his name on it. They did some sculptures between 1913 and 1917 which were “published” in France in 1917 under **Renoir’s** name. There was no copyright notice.

Renoir only did sculpture late in life. He died in 1919 at age 78. These are his sculpture years. He had a stroke and was crippled by arthritis. He badly needed assistance.

When I hear **Renoir** sculpture I tend to think of the ballet dancers. Whups, that’s **Degas**. I think of ... well, I don’t think of anything.

If you google **Renoir Guino** what you find seems to be nude doing laundry in running water — *La Grande Laveuse* — and nude emerging from something or other — the “*Venus Victrix*” which quite looks like a **Maillol**.

The Spanish sculptor **Aristide Maillol** had a skilled assistant **Richard Guino**, a Catalan. He was more than an assistant. **Maillol** pronounced him the most talented sculptor of his generation.

Maillol told **Renoir** “I have found your hands.”

And so the collaboration began. The crippled **Renoir** sat in his studio with a paintbrush tied to his claw-like hands. **Guino** worked in the garden. When he had finished a sculpture, **Renoir** would sign his name to a piece of clay which he would attach to the sculpture.

The art dealer said this would bring a better price. Which was true. But something more sinister was at work. **Guino** learned the truth when he was told to take a day off and returned to find **Rodin** had visited and been told **Renoir** did all the work.

Guino was hidden from view and at last forgotten in art history. He lived poor and suffering from depression.

Renoir’s sons and grandsons sold new editions of the bronzes and pocketed the profits.

In 1965, **Richard Guino** sued the **Renoir** estate. After eight years of squabbling, nine months after **Richard’s** death, a Paris court recognized him as co-creator and awarded his estate fifty percent of royalties.

A trust was formed, which you see in the title, for the benefit of the **Renoir** and **Guino**

descendants. The **Guinos** would control production and reproduction.

In 1984, **Société** got U.S. copyright office registrations for the sculptures.

In 2003, a **Renoir** grandson **Paul**, living in America, sold molds and castings of some sculptures to **Beseder**, a gallery in Scottsdale, Arizona. They sold them to eager buyers.

In 2003, **Société** sued **Renoir** and **Beseder** alleging federal copyright infringement under 17 U.S.C. § 501 *et seq.*, false designation and false description of sponsorship under the **Lanham Act**.

Beseder/Renoir answered that the sculptures were in the public domain.

The district court held, relying on **Twin Books v. Walt Disney Co.**, 83 F.3d 1162 (9th Cir. 1996), that the sculptures were not in the public domain. They were published in a foreign country without copyright notice and were protected for seventy years after the death of the last author.

And then blah-blah-blah and we get to the appeal to the 9th Circuit.

The Appeal

Under the **1909 Act**, a work was protected by state common law copyright from the time of creation until it was published or got protection under the federal scheme. At that time, copyright protection moved there. **La Cienega Music Co. v. ZZ Top**, 53 F.3d 950, 952 (9th Cir. 1995).

Published without protection — public domain. With protection, an author got 28 years plus a 28-year renewal term.

The **1976 Act** shifted the basis of protection from publication to creation. (That’s the put in a “fixed medium” thing you know about.)



Yes, let’s reiterate. Pre-1978, you lost common law protection when published. It either went under the federal scheme or entered the public domain.

But wait. It wasn’t published in the U.S., you’re saying. Exactly. It was published in France.

Twin Books (See: My – haff-kaff – Case of Note in **ATG v.26#3**. It was about *Bambi*.) held that “publication without a copyright notice in a foreign country did not put the work in the public domain in the United States.” 83 F.3d at 1167. “U.S. copyright law should not be given extraterritorial effect.” *Id.* At 1166.

Which it would be if being published abroad without U.S. copyright threw it into the U.S. public domain.

So Public Domain or Protected?

The sculptures were “published” in France in 1917 and again in 1974, both times without U.S. copyright notice. They weren’t published in the U.S. without protection. So they were not put in the U.S. public domain nor were they protected by copyright under the **1909 Act**.

But that didn’t matter because **Beseder** didn’t sell the casts until 2003, and U.S. copyright protection began in 1984.

Then we have to move to the **1976 Act** to determine their status between 1978 and 2003. Section 303(a) applies to worked “created before Jan. 1, 1978, but not theretofore in the public domain or copyright.”

The sculptures were finally copyrighted in 1984. Section 302 gives them a 70-year term of protection from the death of **Guino**, the last surviving author. He died in 1973. If we can do math on this level that gives protection until ... um (counting on fingers) ... 2043. 🐔

Questions & Answers — Copyright Column

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QUESTION: A public librarian reports a new partnership between the library and the local Chamber of Commerce. The Chamber

wants the library to conduct fee-based research for it. The generated data will appear

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in Chamber publications, many of which are sold. If the library uses a commercial vendor such as Proquest for the searches and that data is used in a fee-based publication, is that a copyright violation? Is this issue dependent on the contract with the vendor or copyright law?

ANSWER: Using a fee-based service to provide the copies for your “client” will cover you and the Chamber for the needed copies. However, if the Chamber then wants to reproduce something from one of these documents in a publication, it will need to seek permission for that. In other words, paying for the copy of a copyrighted work does not grant permission for republication. The best source for obtaining this permission is the **Copyright Clearance Center**. It is possible that the Chamber of Commerce already has a license with the CCC for republication. Either the Chamber or library, in its role as a partner, should determine this. Vendors typically cannot grant publication rights.

QUESTION: *An academic librarian asks why the publishers in the Georgia State University case have appealed the second ruling of the federal district court.*

ANSWER: The **GSU** case may be replacing the **Google Books** litigation as the case that will not die! The eight-year-old case was filed in April 2008 alleging that the institution systematically encouraged faculty members to provide copies of copyrighted works to students through e-reserves and course management software without the payment of royalties. **GSU** has defended the case as fair use. The original court ruling found that only five of the 48 infringement claims were not fair use. The 11th Circuit U.S. Court of Appeals reversed and remanded the case although it affirmed much of the district court’s decision. The district court was instructed to rebalance the fair use test factors on remand.

It did so but found only four (instead of five) acts of infringement, denied the publishers’ request for injunctive relief and affirmed that the publishers were liable for **GSU**’s attorneys’ fees, estimated to be more than \$3 million. The rebalance of the factors looked at the second factor to determine whether the nature of the nonfiction books was factual or was mixed with opinion and scholarly writing. The third factor, amount and substantiality used, was changed to consider the effect of the use under the first factor along with the impact of the fourth factor, market effect, in order to determine whether the unauthorized copying was excessive.

Disagreeing with the court’s findings, on August 29, 2016, the publisher plaintiffs filed a notice of appeal.

QUESTION: *The publisher of a small scholarly journal asks about a recent complaint against the publisher of academic journals complaining that it is a “predatory publisher.”*

ANSWER: There have been grumblings about predatory publishers and complaints to the **Federal Trade Commission** for several years. In late August 2016, the **FTC** filed a complaint against **OMICS Group** and two of its subsidiaries claiming that they are exploiting open access publishing by charging researchers very high fees (ranging from a few hundred to several thousand dollars) for publishing in their journals. Authors believe that their works will be published in legitimate journals but, in fact, the journals lack any peer review process and may even publish articles for any author who is willing to pay.

The company is headquartered in Hyderabad, India, and the **FTC** has been watching the company’s behavior for years. **OMICS** publishes more than 700 open access journals, many of which have names similar to legitimate journals, e.g., *iMedPub*. In addition to claiming that the journals fail to reveal that the author pays for inclusion, it also falsely claims that its journals are cited frequently. Further, after being notified that their articles have been accepted for publication and quoted the fees for publication, authors’ attempts to withdraw their articles are rejected which prevents the researcher from publishing the article elsewhere.

Even if the **FTC** complaint is successful, it is unknown the extent to which it will stop predatory publishing practices. **OMICS** has denied all charges.

QUESTION: *A college librarian asks about the recent recommendation from the U.S. Department of Commerce to amend the copyright law, especially the statutory damages provision, about which librarians have long been concerned.*

ANSWER: The *White Paper on Remixes, First Sale and Statutory Damages* was issued early this year. For full text of the white paper, see http://www.ntia.doc.gov/files/ntia/publications/white_paper_remixes-first_sale-statutory_damages_jan_2016.pdf. The focus of the proposed amendment is the individual file sharer and online services which might be secondarily liable for copyright infringement of a large number of works. The paper recommends three changes to the statutory damages provision to: (1) incorporate into the statute a list of factors to use in determining the amount of statutory damages, (2) remove the bar to eligibility for the lower innocent infringement damage awards and (3) give courts discretion to assess statutory damages on other than a per-work basis for non-willful secondary liability of online services involving a large number of works.

(1) The list of factors would include plaintiff’s lost revenues, the difficulty of proving actual damages, defendant’s expenses saved and profits reaped along with other benefits from the infringement, the need to deter future



infringement, value or nature of the infringed work, duration of the infringement, defendant’s state of mind, etc. (2) Section 405(b) of the **Copyright Act** blocks a defendant from claiming innocent infringement if the work contains a notice of copyright. The **Department of Commerce** proposal would eliminate the notice of copyright bar and reduce it to only one relevant factor in the innocence calculus. (3) Instead of the current per-work calculation for damages for non-willful secondary infringers such

as online service providers, courts would apply the factors from # 1 and does not include a mechanism for increasing statutory damages by allowing multiple awards based on the number of uses of a copyrighted work.

It is unclear whether these recommended changes will be enacted into law.

QUESTION: *An academic librarian asks about text and data mining (TDM) and the copyright status of TDM.*

ANSWER: A simple definition of text and data mining is the use of automated analytical techniques to analyze text and data for patterns, trends and other useful information. It is valuable for libraries, researchers, scientists and also to commercial entities. Recently, The Hague Declaration was introduced in Europe. The Declaration is a collaboratively developed set of principles that states that intellectual property law does not regulate “the flow of facts, data, and ideas — and that licenses and contract terms should not regulate or restrict how an individual may analyze or use data.” Another important statement is that the right to read is the right to mine.

The Declaration also states that if funding bodies are considering open licensing mandates as a component of receiving grant funds, they should adopt liberal licensing approaches.

The **Association of Research Libraries** issue brief on *Text and Data Mining and Fair Use in the United States* (<http://www.arl.org/storage/documents/TDM-5JUNE2015.pdf>) states that numerous court decisions have upheld the reproduction necessary to perform TDM as fair use. Later in the same paragraph, the issue brief says that there is no specific exception to the copyright law in the United States to allow TDM, but that fair use has accommodated it as a new research tool.

There is certainly support among library organizations and the **Creative Commons** to recognize TDM as fair use. One important question is whether there is a difference in nonprofit use, i.e., non-consumptive research use and in commercial use of copyrighted works for TDM. So, the copyright status of TDM in the United States is as clear as fair use is clear. 🌿